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**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies. | Rulemaking 06-04-009<br>(Filed April 13, 2006) |

# REPLY COMMENTS OF THE NATURAL RESOURCES DEFENSE COUNCIL (NRDC), THE UTILITY REFORM NETWORK (TURN), THE UNION OF CONCERNED SCIENTISTS (UCS), AND THE WESTERN RESOURCE ADVOCATES (WRA) ON THE DRAFT "INTERIM OPINION ON PHASE 1 ISSUES: GREENHOUSE GAS EMISSIONS PERFORMANCE STANDARD"

January 8, 2007


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## 1. Introduction and Summary

The Natural Resources Defense Council (NRDC), The Utility Reform Network (TURN), the Union of Concerned Scientists (UCS), and the Western Resource Advocates (WRA)[1] respectfully submit these comments, pursuant to Rules 14.3, 1.9, and 1.10 of the California Public Utilities Commission's (CPUC or Commission) Rules of Practice and Procedure, on President Peevey and Administrative Law Judge (ALJ) Gottstein's draft "Interim Opinion on Phase 1 Issues: Greenhouse Gas Emissions Performance Standard" (Draft Decision or DD).

We strongly support the Draft Decision, which would implement a greenhouse gas (GHG) emissions performance standard (EPS) consistent with Senate Bill (SB) 1368 and protect Californians from the significant financial and reliability risks associated with additional investments in high GHG-emitting generating technologies. In these comments, we address some of the issues raised in parties' opening comments. In summary:

- We continue to support the DD's proposed requirement that all long-term contracts specify the underlying generation facilities for EPS compliance. Limited provisions for temporary "substitute energy" uses of system power may be appropriate as PG&E proposes, but we urge the Commission to consider the broader implications of adopting such provisions.
- Multiple contracts must be monitored for attempts to circumvent the EPS.

[1] WRA supports and seeks to join the Comments of NRDC-TURN-UCS on the Draft "Interim Opinion of Phase I issues: Greenhouse Gas Emissions Performance Standard" filed on January 2, 2007 in this docket.

- ESPs, CCAs, and small MJUs should be required to submit formal filings with the Commission for EPS compliance. We continue to assert that the Commission can best determine non-compliance through upfront, rather than after-the-fact, approval.
- Until an alternative compliance method is approved by the Commission, all MJUs must demonstrate compliance with the EPS.

**2. We continue to support the DD's proposed requirement that all long-term contracts specify the underlying generation facilities for EPS compliance. Limited provisions for temporary "substitute energy" uses of system power may be appropriate as PG&E proposes, but we urge the Commission to consider the broader implications of adopting such provisions.**

Various parties suggest that the Commission should not prohibit all long-term contracts for system energy, as the DD proposes. We support the DD's finding that it is reasonable to require all long-term contracts to be with specified sources and that doing so is consistent with the intent of SB 1368, since there is no way to ensure that unspecified resources would meet the EPS. We encourage the Commission to further explore how to identify the emissions of system power through a working group process in Phase 2 of this proceeding.

Pacific Gas & Electric Company (PG&E) proposes that the Commission allow a limited amount of system energy from unspecified sources to be used as "substitute energy," capped at 15 percent of the forecasted energy deliveries under a contract. PG&E's proposal seems reasonable in principle, particularly in light of the intermittent nature of renewable generators and their potential need for firmed contracts. However, we also have several concerns and urge the Commission to more fully consider the issue if it chooses to address this level of detail of implementation of the EPS.

We urge the Commission to ensure that such substitute energy is explicitly restricted to temporary, event-driven circumstances (e.g., forced outages, scheduled maintenance, or variations in renewable energy output) and not permitted simply due to economic considerations. In addition, LSEs should be prohibited from interpreting any provision for the use of substitute energy as a carve-out for system power for a specific portion of a contract. Any provision for the use of substitute energy must ensure that the 15 percent cap should truly be a ceiling and not a targeted level and apply only in the limited, temporary conditions as discussed above.

We are concerned that the conditions proposed by PG&E (p. 5) for substitute energy are overly broad. The language in Condition A that permits the use of system energy during "temporary unavailability for operational or efficiency reasons" is unclear, and could be interpreted in an overly broad manner and may create opportunities for load-serving entities (LSEs) to subvert the DD's prohibition of long-term contracts for system power. We are also concerned that the provision for "minimum number of operating hours" in Condition B could be used by LSEs as an avenue to "build in" system power into a long-term unit-specific contract.

**3. Multiple contracts must be monitored for attempts to circumvent the EPS.**

Southern California Edison (SCE) and Constellation request additional guidance on what constitutes multiple shorter-term contracts that, strung together, would qualify as a long-term financial commitment as defined by SB 1368. We strongly disagree with SCE's suggestion that contracts only be considered "linked" if "the selection and execution of any of the contracts in the series required the selection and execution of some or all of the others in the series" (p. 10). SCE does not adequately explain how this proposed change will prevent the types of contract "stacking" that the DD expressly intends to avoid. The simple lack of a contractual requirement that the same unit, resource, or supplier be subsequently re-subscribed in a separate contract provides no assurance that the LSE will not choose to enroll a separate contract in a way that seeks to circumvent the EPS by contract stacking. SCE's alternative suggestions that tie the linkage of multiple contracts to the timing of contract execution are likewise unpersuasive. While SCE's suggested requirements governing execution timeframes may be consistent with the timing of RFO and day-to-day trading decisions, there is still nothing in SCE's suggested definition that will prevent LSEs from executing stacked contracts according to these timeframes. Short of clarifying what constitutes "linked" contracts, SCE's suggested changes merely create loopholes that LSEs could exploit to circumvent EPS rules.

Constellation also suggests that the Commission should not monitor shorter-term contracts that may qualify as multiple contracts, since these contracts are needed for resource adequacy. However, Constellation's argument relies on a hypothetical example of a facility that "is not expected to operate any longer in baseload mode" (p. 6), which would not even be subject to the EPS, since its capacity factor, as designed *and intended*, would be less than 60 percent.

4. **ESPs, CCAs, and small MJUs should be required to submit formal filings with the Commission for EPS compliance. We continue to assert that the Commission can best determine non-compliance through upfront, rather than after-the-fact, approval.**

The Alliance for Retail Energy Markets (AReM) and the City and County of San Francisco (CCSF) suggest that electric service providers (ESPs), community choice aggregators (CCAs), and small electrical corporations (i.e., small multi-jurisdictional utilities, or MJUs, as defined by SB 1368 §8341(d)(9), that do not have a Commission-approved alternative compliance process) should not be required to file formal advice letters. We continue to urge the Commission to adopt an upfront approval process, but irrespective of whether the Commission decides to adopt our recommendation for upfront approval, all LSEs should be subject to the full public process that accompanies the filing of advice letters, which includes the opportunity for parties to file responses and protests.

AReM also argues that penalties for non-compliance should be assessed only for "knowing or willful violations of the EPS rules" (p. 8). CCSF also argues for penalties "commensurate with the degree of fault" and points out the possibility of "simple errors" made in filings (p. 10). These arguments for the softening of penalties are clearly indicative of the problem with after-the-fact enforcement of the standard. Any determination of "knowing or willful violations" will be difficult and contentious, and allowing this provision will increase the possibility that no ESP, CCA, or small MJU will ever be penalized for non-compliance, since they could simply argue that they were not aware their commitment violated the EPS. Any confusion about a commitment's compliance status or "errors" in determining compliance should **<u>not</u>** be left to be resolved until after a commitment is already made. Instead, upfront approval will eliminate any confusion and ensure uniform application of the EPS for all LSEs.

5. **Until an alternative compliance method is approved by the Commission, all MJUs must demonstrate compliance with the EPS.**

Sierra Pacific Power Company argues that, in the absence of an alternative compliance mechanism, interim compliance should not be required of MJUs (p. 10). Although SB 1368 allows for alternative compliance for small MJUs, the statute does not also guarantee that alternative compliance will be granted. Section 8341(d)(9) states: "An electrical corporation that provides electric service to 75,000 or fewer retail end-use customers in California may file with the commission a proposal for alternative compliance with this section, which the commission ***may*** accept upon a showing by the electrical corporation of both of the following [conditions]…" (emphasis added) Alternative compliance for each MJU must be evaluated by the Commission on a case-by-case basis, and until a proposal is approved, each MJU must demonstrate compliance with the EPS.

**6. Conclusion**

We strongly support the Draft Decision as being consistent with SB 1368, and we urge the Commission to adopt it without delay. We commend the Commission for its leadership in establishing the EPS. This Draft Decision will ensure that the EPS protects California's consumers from the financial, reliability, and environmental risks associated with additional commitments to highly GHG-intensive generating technologies and will help meet California's GHG reduction goals.

Dated: January 8, 2007

Respectfully submitted,

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Also on behalf of:
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the **"Reply Comments of the Natural Resources Defense Council (NRDC), The Utility Reform Network (TURN), the Union of Concerned Scientists (UCS), and the Western Resource Advocates (WRA) on the Draft 'Interim Opinion on Phase 1 Issues: Greenhouse Gas Emissions Performance Standard'" in the matter of R.06-04-009** to all known parties of record in this proceeding by delivering a copy via email or by mailing a copy properly addressed with first class postage prepaid.

Executed on January 8, 2007 at San Francisco, California.

Shari Walker

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